

DOCKET NO. 575879

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	
AYERS CITY STOP INC.	§	
D/B/A AYERS CITY STOP INC.	§	ALCOHOLIC
PERMIT/LICENSE NO(s). BQ442222	§	
	§	
	§	
NUECES COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-09-0479)	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION this 8th day of May, 2009, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Melissa M. Ricard. The hearing convened on December 16, 2008 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on February 18, 2009. The Proposal for Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. Exceptions and Reply to Exceptions were filed to which the Administrative Law Judge did not issue recommendations for changes to the Proposal for Decision.

The Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

IT IS THEREFORE ORDERED by the Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's permits and licenses be **CANCELED FOR CAUSE**.

This Order will become final and enforceable on June 1, 2009 unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties in the manner indicated below.

SIGNED this the 8th day of May, 2009, at Austin,
Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
5155 Flynn Parkway; Suite 200
Corpus Christi, TX 78411
VIA FACSIMILE TO: (361) 884-5427

Rene Luna
ATTORNEY FOR RESPONDENT
5430 Holly Road, Ste. 1
Corpus Christi, TX 78411
VIA FACSIMILE TO: (361) 985-0046

Ayers City Stop Inc.
d/b/a Ayers City Stop Inc.
RESPONDENT
5220 Ayers
Corpus Christi, TX 78415
VIA U.S. FIRST CLASS MAIL

Sandra K. Patton
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Enforcement District Office

SKP/aa

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

February 18, 2009

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA INTERAGENCY MAIL

**RE: Docket No. 458-09-0479/TEXAS ALCOHOLIC BEVERAGE COMMISSION
vs. AYERS CITY STOP INC. d/b/a AYERS CITY STOP**

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in black ink, appearing to read "Melissa M. Ricard".

MELISSA M. RICARD
Administrative Law Judge

MMR/MAR

Enclosure

xc SANDRA PATTON, STAFF ATTORNEY, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA INTERAGENCY MAIL**

Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-

VIA MAIL INTERAGENCY MAIL

Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 -

VIA INTERAGENCY MAIL (with exhibits Nos. _____ and _____ hearing CDs)

RENE LUNA, ATTORNEY AT LAW, 5430 HOLLY RD. SUITE 1, CORPUS CHRISTI, TX 78412 -

VIA REGULAR MAIL

A hearing was convened on December 16, 2008, before ALJ Melissa M. Ricard at the SOAH Corpus Christi Regional Office. The TABC's staff was represented at the hearing by

Sandra Patton, staff attorney, by telephone. The Respondent was represented by Rene Luna, attorney at law. The record closed upon the conclusion of the hearing.

III. DISCUSSION

A. Background

Ayers City Stop is a convenience store located at 5220 Ayers Street, Corpus Christi, Nueces County, Texas. Respondent holds a wine and beer retailer's off premise permit, BQ-442222. Respondent's administrative violation history was admitted into evidence which includes the following:

Violation date	Violation description	Disposition
05-17-08	Possession of A/B Unfit for Consumption	Written warning
02-26-08	Possession of A/B Unfit for Consumption	Written warning
10-16-07	Sale to minor	Suspension or Civil penalty
10-10-07	Possession of A/B Unfit for Consumption	Written warning
06-30-07	Sale/Delivery of Drugs by Employee	Dismissed
06-08-07	Possession of A/B Unfit for Consumption	Written warning
08-16-06	Possession of A/B Unfit for Consumption	Written warning
04-21-06	Sale to minor	Suspension or Civil penalty
3-10-05	Sale to minor	Civil penalty
7-21-01	Sale to minor	Civil penalty

B. Petitioner's Case

TABC Agent Dennis Chupe conducted a "sting" operation at the licensed premises on April 12, 2008. Agent Chupe conducted several operations that day, all involving the sale of alcohol to minors. Brittany Chupe, age 16, entered the premises on that day at about 2:30 p.m. Agent Chupe stated that the minor was youthful in appearance, did not wear make up and was dressed as if she was going to school as a typical teenager. The minor went into the licensed premises, took a 24 oz. Miller Lite beer out of the refrigerated cooler, and took it to the counter.

The minor had a driver's license in her hand, but the clerk behind the counter rang up the sale without asking to see any identification. The minor paid \$2.15 for the beer.

Agent Chupe entered the premises about 30 seconds behind the minor and kept her in visual contact at all times, staying four to five feet behind her. The entire transaction was video taped by Agent Chupe.

Other TABC agents on site for the operation identified Myra Hernandez as the clerk of the establishment who sold the beverage and issued a summons to her. Ms. Hernandez was also given the administrative violation notice for the establishment. Ms. Hernandez was TABC server-trained at the time. No TABC rules or policies were posted at the establishment at the time of the investigation.

C. Respondent's Case

Aman Ullah is the owner of Ayers City Stop. Mr. Ullah is in the process of selling the establishment. He testified that if the alcoholic beverage permit for this location is canceled, then his business would be "worthless." He also stated that there was no discussion between the minor and the clerk, and the clerk assumed that the minor was old enough because she had a license in her hand. He fired the clerk and now staffs the store personally.

Mr. Ullah stated that the TABC conducted another investigation of the premises on November 8, 2008. He produced a letter from the TABC which showed that on that day, the employee of the premises required proof of age.

IV. STATUTORY AUTHORITY

TABC rule 16 TEX. ADMIN. CODE (TAC) § 61.71 (a) (1) states

The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee violated a provision of this

code or a rule of the commission during the existence of the license sought to be canceled or suspended or during the immediately preceding license period.

TEX. ALCO. BEV. CODE §106.13 states:

(a) Except as provided in Subsections (b) and (c) of this section, the commission or administrator may cancel or suspend for not more than 90 days a retail license or permit or a private club registration permit if it is found, on notice and hearing, that the licensee or permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to violate Section 106.04 or 106.05 of this code on the licensed premises.

(b) For a second offense the commission or administrator may cancel the license or permit or suspend it for not more than six months. For a third offense within a period of 36 consecutive months the commission or administrator may cancel the permit or suspend it for not more than 12 months.

Rule 16 TAC § 50.11 provides:

(d) The following practices constitute prima facie evidence of indirect encouragement of law within the meaning of §106.14(a)(3) of the Alcoholic Beverage Code:

(2) the licensee/permittee fails to adopt, and post within view of its employees, policies and procedures designed to prevent the sale, service or consumption of alcoholic beverages by or to minors and intoxicated persons, and that express a strong commitment by the licensee/permittee to prohibit such sales, service or consumption.

V. ANALYSIS

The evidence shows that Respondent has repeatedly sold alcohol to minors, including three times within 36 months. The Respondent sold alcohol to a minor four times in a three-year-and-one-month-period, and five times overall during the life of the permit. Further, because the evidence shows that Respondent failed to post policies and procedures designed to prevent the sale of alcoholic beverages to minors, the Staff has established that Respondent indirectly

encouraged the sale of alcohol to minors. Under these circumstances, Respondent's permit should be cancelled.

VI. PROPOSED FINDINGS OF FACT

1. On June 2, 2008, the staff of the Texas Alcoholic Beverage Commission (TABC) sent a notice of hearing to Respondent stating that a hearing would be held on this matter. On November 13, 2008, an Order on Motion for Continuance reset this matter for hearing to December 19, 2008, at the State Office of Administrative Hearings (SOAH) in Corpus Christi, Texas.
2. The notice contained a statement of the legal authority and jurisdiction for the hearing, a reference to the particular sections of the statutes and rules involved, and a short, plain statement of the matters asserted.
3. On December 16, 2008, the hearing convened at SOAH in Corpus Christi, Texas, before the undersigned Administrative Law Judge (ALJ). Staff Attorney Sandra Patton represented TABC. Attorney Rene Luna represented Respondent.
4. Ayers City Stop d/b/a Ayers City Stop (Respondent) is the holder of a wine and beer retailer's off premise permit, BQ-442222, located at 5220 Ayers Street, Corpus Christi, Nueces County, Texas.
5. On October 16, 2007, April 21, 2006, March 10, 2005 and July 21, 2001, Respondent agreed to four settlements and waivers of hearing stemming from allegations that Respondent served alcohol to a minor.
6. On April 12, 2008, an employee of Respondent sold alcohol to a minor.
7. On April 12, 2008, Respondent did not have his policies and procedures regarding the sale of alcohol to minors posted.

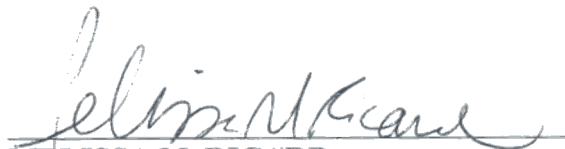
VII. PROPOSED CONCLUSIONS OF LAW

TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 6.01 and 11.11.

2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Ch. 2003.

- 3 Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. On April 12, 2008, Respondent, his agent, servant, or employee, with criminal negligence, sold, served, dispensed or delivered an alcoholic beverage to a minor in violation of TEX. ALCO. BEV. CODE ANN. § 106.13.
- 5 Based on the Findings of Fact and Conclusions of Law, Respondent's wine and beer retailer's off premise permit, BQ-442222 should be cancelled.

Signed February 18, 2009


MELISSA M. RICARD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS